



Jim Lamoureux
Senior Counsel

SBC Telecommunications Inc.
1401 I Street NW, Suite 400
Washington, D.C. 20005
Phone 202 326-8895
Fax 202 408-8745

November 13, 2003

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street SW
Washington DC 20554

Re: WC Docket No. 02-215; Applications of WorldCom, Inc. (debtor-in-Possession d/b/a MCI, Inc. and Certain of its Subsidiaries for Authorization to Assign and/or Transfer Control Licenses and Authorizations

Objection to Request for Disclosure of Documents or, in the Alternative, Request for Protective Order Allowing Only for the Viewing of Requested Documents and Prohibiting the Copying and/or Reproduction of Such Requested Documents

Dear Ms. Dortch:

Pursuant to ¶ 8 of the *Protective Order* issued by the Commercial Wireless Division on November 4, 2003, in the above captioned proceeding, SBC objects to Mr. Belendiuk's request for a copy of the Settlement Agreement between SBC Communications Inc. ("SBC") and WorldCom *et al.* in WorldCom's bankruptcy proceeding in the in the United States Bankruptcy Court Southern District of New York (Chapter 11 Case No. 02-13533 (AJG)) ("Settlement Agreement"), and the documents accompanying the Settlement Agreement. In the alternative, the Commission should modify its Protective Order to allow SBC to designate the documents as highly sensitive and permitted to be reviewed but not copied. SBC submitted such documents to the Commission on October 3, 2003, with an accompanying request for confidentiality.

As SBC discussed in its request for confidentiality, commercial information that is voluntarily submitted to the Commission must be withheld from public disclosure under *Critical Mass* if such information is not customarily disclosed to the public by the submitter.¹ The information submitted herewith clearly satisfies this requirement. Pursuant to its own terms, the Settlement Agreement is not available to the public. In fact, not even the Creditors Committee or the Office of the United States Trustee was provided with a copy of the Settlement Agreement before the Bankruptcy Court for the Southern District of New York approved it. Accordingly, under *Critical Mass*, the information submitted is not disclosable.

¹ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

Moreover, under the competitive harm prong of the *National Parks* test, information should be withheld if it is typically withheld by a company and risks harming the competitive position of the person whose information has been provided to the agency.² The information for which SBC requested confidential treatment satisfies these requirements. The Settlement Agreement contains information pertaining to the business relationships between WorldCom and SBC, as well as details of the settlement reached between the two carriers. The Settlement Agreement involved the resolution of a series of complex and sensitive claims between the parties and provided for a substantial monetary recovery on SBC's claims. The scope of the Settlement Agreement is unique to the resolution reached between WorldCom and SBC. The inadvertent public disclosure of the Settlement Agreement would provide existing and potential competitors with competitively sensitive information regarding the details of SBC's settlement with WorldCom. Moreover, absent the background of the lengthy, heavily negotiated and complex discussions that lead to the execution of the Settlement Agreement, the truly mutual beneficial nature of the Settlement Agreement may be misconstrued by other creditors of WorldCom. Such misconstruction by other creditors could potentially expose SBC to the risk of litigation. As such, the Settlement Agreement is highly sensitive, and dissemination of copies of the Settlement Agreement should be prohibited.

The protective procedures established by the Commission and other governmental agencies recognize the need to keep such information confidential to the maximum extent possible. The Commission has provided the assurances that it is "sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulates at a competitive disadvantage."³ Courts also have recognized that settlement agreements and related documents constitute privileged information under Exemption 4 of the FOIA. *See M/A-Com Information Systems, Inc. v. U.S. Dep't of Health and Human Svcs.*, 656 F. Supp. 691 (D.D.C. 1986). In addition, the power of a court to seal settlement documents "takes precedence over FOIA rules that would otherwise allow those documents to be disclosed." *City of Hartford v. Chase*, 942 F.2d 130, 135 (2d Cir. 1991).

For these reasons, the Commission should not permit disclosure of the documents. In the alternative, it should modify its Protective Order to allow SBC to designate the documents as highly sensitive and permitted to be reviewed but not copied.⁴ It is standard practice, moreover, for FCC protective orders to prohibit copying of highly sensitive documents. Protective orders issued, for example, in the FCC's section 271 proceeding limit parties seeking access to highly sensitive documents to inspection of those documents, and prohibit the copying of those documents. Similarly, in the Ameritech/SBC Merger, the Commission's protective order prohibited parties from copying highly sensitive confidential documents.⁵ At a minimum, the same rules should apply here. That is particularly so given that the relevance of the Settlement Agreement to the FCC's section 214

² *National Parks & Conservation Ass'n v. Morton*, F.2d 765, 770 (D.C. Cir. 1974).

³ *Confidential Information Order* at ¶ 8.

⁴ SBC hereby designates the documents as highly sensitive in the event that the Commission modifies its Protective Order as requested.

⁵ Copies of such protective orders are attached.

proceeding is tenuous at best. In the section 214 proceeding, the FCC must decide whether certain license transfers are in the public interest. The Settlement Agreement does not even speak to that issue. *At most*, it speaks to the issue of why SBC chose not to take any position in this proceeding. The interests of private parties in determining why other private parties decide not to participate in FCC proceedings is not an interest that is of any great import. Ultimately, the FCC decides the issues before it based on its own judgment of the merits. It is free to deny applications even when they are unopposed, and it is free to grant applications in the face of stiff opposition. But even if Ms. Snyder has *some* interest in learning why SBC did not participate in this section 214 proceeding, that interest hardly justifies a departure from the Commission's own routine practice for protecting highly sensitive confidential information.

As SBC discussed in its request for confidentiality, the situation in this instance is similar to that of *In re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd* 677 F.2d 230 (1982). In that case, a nonprofit organization sought documents from the Federal Deposit Insurance Corporation ("FDIC") pertaining to the settlement of litigation concerning the insolvency of a major lending institution. The settlement was the "result of intensive negotiation," and "could not have been achieved without an agreement that the amounts paid would not be revealed."⁶ As a result, the settlement agreement included a confidentiality provision. The district court issued an order protecting the confidentiality of the settlement agreement. The non-profit group nonetheless submitted a FOIA request to the FDIC for a copy of the settlement agreement. The FDIC denied the request, and the non-profit group petitioned the district court to modify its protective order. In denying the request, the district court specifically noted the interest in settling the litigation, and it noted that confidentiality was a "critical factor" in reaching settlement.⁷ It found, moreover, that "the statutory goal is not necessarily defeated when an agency obtains protection from a court that is broader than the FOIA exemptions."⁸

Similarly, in this instance, there is a substantial public interest in preserving the integrity of the settlements of the WorldCom bankruptcy litigation. WorldCom successfully confirmed its bankruptcy cases on October 31, 2003. As part of the Settlement Agreement SBC waived its rights to oppose the confirmation process. In addition to the potential competitive disadvantage that would result from the release of the Settlement Agreement, SBC may be subject to a collateral attack by dissatisfied WorldCom creditors. This could ultimately delay or perhaps prevent SBC's receipt of the negotiated settlement funds. Given the current status of the WorldCom bankruptcy cases, SBC would have insufficient legal redress available in the Bankruptcy Court and thus would be

⁶ *Id.* at 470.

⁷ *Id.* at 472.

⁸ *Id.*

irreparably harmed. Disclosure poses substantial risks of unraveling the bargained for settlement reached between SBC and WorldCom.

For all the foregoing reasons, SBC requests that the Commission deny Mr. Belendiuk's request for documents. In the alternative, SBC requests that the Commission modify its Protective Order to allow SBC to designate the documents it provided to the Commission as highly sensitive and permitted to be reviewed but not copied.

Sincerely,
/s/ Jim Lamoureux

Jim Lamoureux
Senior Counsel
SBC Telecommunications, Inc.

Attachments

cc: Arthur V. Belendiuk